82-1999

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NO.

in the
Supreme Court
of the
United States
October Term, 1982

PABLO LAZARO CHAVEZ,
Petitioner,

vs.

JIM SMITH,
Attorney General, State of Florida,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HENRY GONZALEZ, ESQ.
620 Madison Street
Suite 1-A
Tampa, Florida 33602
813-229-7289

QUESTION PRESENTED

WHETHER THE COURT ERRED BY INVOKING THE DIRECT CONTEMPT PROVISION OF FLORIDA RULES OF CRIMINAL PROCEDURE 3.830 TO THIS CASE AND IN DOING SO VIOLATED THE FIFTH AMENDMENT DUE PROCESS CLAUSE AND EQUAL PROTECTION 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

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The Petitioner, PABLO LAZARO CHAVEZ, respectfully prays that a writ of certiorary issue to review the decision and opinion of the United States Court of Appeals for the Eleventh Circuit entered on

January 24, 1983. The Eleventh Circuit's opinion affirmed judgments of the District Court entered by the United States District Court for the Middle District of Florida in a direct contempt brought by the State of Florida against the Petitioner.

OPINION BELOW

On December 20, 1982, the United States District Court of Appeals for the Eleventh Circuit entered a judgment affirming the judgment of the District Court, a copy of which is attached hereto.

A Petition for Rehearing was filed on January 7, 1983, and said petition was denied on January 24, 1983. A copy of said denial is attached hereto.

JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit affirming the District Court's judgment was entered on December 20, 1982.

The decision of the Court of Appeals for the Eleventh Circuit on petition for rehearing was entered on January 24, 1983.

This petition for certiorari is filed within sixty (60) days of the lower court's decision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment, of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On October 18, 1978, the State Attorney in and for Pinellas County, Florida, issued investigative subpoena to the Petitioner, PABLO LAZARO CHAVEZ. The subpoena was returnable on October 27, 1978, at the Office of the State Attorney in Clearwater, Florida. At said time and date, Petitioner did appear before the Assistant State Attorney with defense counsel, at which time, several questions were propounded to the Petitioner concerning an investigation of alleged marijuana transactions. Petitioner chose to invoke his Fifth Amendment privilege against self-incrimination. Petitioner was then brought before the Court and again asked the same questions and again invoked his Fifth Amendment privilege though he was advised that the State was proceeding under Florida Statute 914.04; that by answering he would receive transactional immunity and that he could not continue to invoke his Fifth Amendment privilege.

Defense counsel requested an opportunity to prepare for a contempt hearing and argued that the State was attempting to turn and indirect contempt into a direct contempt by bringing Petitioner before the Court. The Court found the Petitioner to be in direct contempt and sentenced him to one hundred and twenty (120) days incarceration.

An appeal was taken and the judgment and sentence was affirmed to the Second District Court of Appeals on September 21, 1979; Petition for Rehearing was denied on October 26, 1979.

On the 9th day of November, 1979, your Petitioner filed a Petition for Writ of Certiorari to the Supreme Court of the State of Florida which said Petition was denied on March 24, 1980. Simultaneously with the filing of the Petition for Certiorari to the Supreme Court of the State of Florida, your Petitioner filed before the Honorable John S. Andrews, Circuit Judge in and for Pinellas County, Florida, his Motion for Post Conviction Relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and pursuant to said motion the Honorable John S. Andrews did on the 16th day of January, 1980, hear argument of counsel and entered an Order denying said Motion.

An appeal was taken to the District Court of Appeal of Florida, Second District and on January 14, 1981, the Court of Appeals for Florida, Second District, Per Curium affirmed the Order of Judge Andrews.

On February 26, 1981, a Notice of Certiorari Jurisdiction was filed in the Supreme Court of the State of Florida. On Wednesday, March 3, 1981, the Supreme Court of the State of Florida issued an Order that it was without jurisdiction and dismissed the Petition for Review.

On March 27, 1981, Petitioner filed his Petition for Writ of Habeas Corpus pursuant to the Provisions of 28 U.S.C. §2254, and on May 12, 1981, said Petition was denied.

On June 2, 1981, the Honorable Ben Krentzman, Judge of the United States District Court for the Middle District of Florida dismissed Petitioner's Petition for Writ of Habeas Corpus and on the 9th day of June,

1981, a notice of appeal was filed. Petition for Writ of Certiorari to this Honorable Court then followed.

REASON FOR GRANTING THE WRIT

THE COURT ERRED BY INVOKING THE DIRECT CONTEMPT PROVISION OF FLORIDA RULES OF CRIMINAL PROCEDURE 3.830 TO THIS CASE AND IN DOING SO VIOLATED THE FIFTH AMENDMENT DUE PROCESS CLAUSE AND EQUAL PROTECTION 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

A contempt proceeding may be classified as criminal or civil depending upon its purpose. If that purpose is punitive in nature designed to vindicate the authority of the Court, then the contempt is deemed criminal and an unconditional punishment will be imposed. *Shillitani v. United States*, 384 U.S. 364 (1966); *Pugliese v. Pugliese*, 347 So.2d 422 (Fla. 1977). If the character and purpose is coercive, then the contempt is classified as civil. *Shillitani v. United States, supra; Pugliese v. Pugliese, supra.*

A refusal to answer questions on self-incrimination grounds after the Fifth Amendment privilege has been removed through an appropriate grant of immunity may be deemed a contemptuous act and treated either as criminal or civil in nature. *In RE Before the Third Statewide Grand Jury*, 360 So.2d 4 (Fla.) (2d DCA 1978). In the instant case the Court found Appellant in criminal contempt and imposed a definite period of incarceration.

The classification of criminal contempt has been subdivided into two (2) types, direct and indirect. Direct criminal contempt has been codified in Florida Rules of Criminal Procedure 3.830. By that rule, the Court may punish summarily conduct constituting contempt when such conduct was "committed in the actual presence of the court." The Supreme Court of the State of Florida in speaking of the summary nature of the direct criminal contempt procedure noted:

> "The purpose of such rules is to clothe the trial court with full and complete power to enforce all rules of procedure and the conduct of all parties in the trial of the cases and hearings before him, whether in chambers or before a jury. It is an essential power and one necessary to the orderly functioning of the courts, and the fair and efficient administration of justice. The nature of the summary procedures are to enable the court to enforce its orders promptly and with dispatch." *Fisher v. State*, 248 So.2d 479, 487 (Fla. 1971).

When the alleged contemptuous action did not take place in the presence of the Court, it is deemed indirect (or constructive) criminal contempt and the procedure of Florida Rules of Criminal Procedure 3.840 comes into play. Rule 3.840 affords the accused greater procedural safeguards including time to prepare a defense.

The issue herein raised in the instant case is whether the conduct of Petitioner should have invoked the summary procedures of direct criminal contempt procedures outlined in Rule 3.840. It is respectfully submitted that the conduct of your Petitioner was at

most an indirect criminal contempt and that failure to follow the procedural guidelines of Florida Rules of Criminal Procedure 3.840 requires that the order of contempt be vacated.

This Honorable Court has had the opportunity to review this point of law in the cases of *Harris v. United States*, 382 U.S. 162, 86 S.Ct. 352 (1965) and *United States v. Wilson*, 421 U.S. 309, 95 S.Ct. 1802 (1975). In those cases, the Federal criminal contempt provisions were reviewed in reference to individuals who refused to testify after being granted immunity. Those provisions are contained in Rule 42(a) and 42(b), Federal Rules of Criminal Procedure. Rule 42(a) dealing with conduct occurring in the presence of the Court is akin to the direct criminal contempt provision of Florida Rules of Criminal Procedure 3.830 containing the same language in all pertinent parts. Rule 42(b) providing additional procedural safeguards for contemptuous conduct occurring outside the presence of the Court.

In *Harris, supra*, a witness called before the Federal Grand Jury, refuse to testify on the grounds of self-incrimination. He was brought before the District Court, granted immunity and ordered to answer questions. He again refused to answer the questions before the Grand Jury. He was brought back to the District Court and asked the same questions. Again, he refused. The District Court then sentenced him in summary proceeding under Rule 42(a) to one (1) year's imprisonment. 85 S.Ct. 353. This Honorable Court reversed and remanded noting that Rule 42(a) was inapplicable and that proceedings under Rule 42(b) (the "indirect contempt provision") should have been held. This Court noted that the contempt, if any, had occurred before the

grand jury and that the courtroom appearance was ancillary to the grand jury hearing and designed to aid it. Further, there was no urgency; delay would not imperil the grand jury proceeding. 86 S.Ct. 354. In *United States v. Wilson*, 421 U.S. 309, 95 S.Ct. 1802, (1975), the Supreme Court found that the District Court had properly imposed summary contempt under Rule 42(a) where a trial witness persisted in his refusal to testify after being granted immunity. This Court distinguished *Harris, supra*, by noting:

> The crucial difference between the cases, however, is that *Harris* did deal with the refusal to testify which obstructed an ongoing trial. In *Harris*, a witness before a grand jury had been granted immunity . . . and nevertheless refused to answer certain questions. The witness was then brought before a District Judge and asked the same questions again. When he still refused to answer, the Court summarily held him in contempt. We held in that case that summary contempt was inappropriate because there was no compelling reason for an immediate remedy.
>
> A Grand Jury ordinarily deals with many inquiries and cases at one time, and it can rather easily suspend action on any one, and turn to another while proceedings under Rule 42(b) ("indirect contempt") are completed.
>
> We note in *Harris*, that swiftness was not a prerequisite of justice . . . Delay necessary for a hearing would not imperil the grand jury proceedings. (Citation omitted). Trial courts,

> on the contrary cannot be expected to dart from case to case on their calendars any time a witness who has been granted immunity decides not to answer questions. In a trial, the court, the parties, witnesses and jurors are asembled in the expectation that it will proceed as scheduled.

United States v. Wilson, 95 S.Ct. 1807. In *Wilson, supra*, as opposed to *Harris, supra*, the contemptuous action, refusal to testify at trial did occur in the presence of the Court as required by Rule 3.830 of the Florida Rules of Criminal Procedure and this Honorable Court found that the District Court acted properly in invoking summary contempt.

The case at bar, it is submitted, comes squarely within the dictates of *Harris v. United States, supra*, and outside the holding of *United States v. Wilson, supra*. The Petitioner, was subpoenaed to the State Attorney's Office in conjunction with an investigation of marijuana trafficking. His appearance was similar to that considered in *Harris*. As a grand jury can put aside one investigation while awaiting for a disposition of an indirect contempt matter so can the State Attorney put aside one of its many investigations while a reluctant witness is afforded his procedural due process rights. Petitioner was not called to testify at a trial; the only reason he refused to testify in the presence of the Court was because the Assistant State Attorney brought him there to attempt, if not presumed, to coerce him to testify. The fact that Petitioner refused then to testify in Court does not bring summary contempt procedures

into play. *Harris v. United States*, 86 S.Ct. at 354. As the Supreme Court of Florida said on this very point:

> Were this contention (that a contempt occurring out of the prsence of the Court could be made to occur within its presence when it is repeated at an ancillary proceeding) accepted, the distinction between direct and indirect criminal contempt would be obliterated because the Judge must always be hear some testimony in his presence at a hearing on indirect contempt concerning conduct which took place outside his presence. We reject any notion that would expunge the distinction between direct and indirect contempt.
>
> *Pugliese v. Pugliese*, 347 So.2d 422, 426, (Fla. 1977).

CONCLUSION

In view of the vital importance of the question presented and the considerations set forth above, this Court should grant this petition for writ of certiorari.

HENRY GONZALEZ, ESQ.
620 Madison Street, Suite 1-A
Tampa, Florida 33602
813/229-7289

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to the Office of the Solicitor General, Room 5614, United States Department of Justice Washington D.C. 20530, this 21st day of April, 1983.

HENRY GONZALEZ, ESQ.
620 Madison Street, Suite 1-A
Tampa, Florida 33602
813/229-7289

Appendix

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 81-6107
Non-Argument Calendar

D.C. Docket No. 81-271-CIV-T-WC (K)

PABLO LAZARO CHAVEZ,
Petitioner,

versus

JIM SMITH,
Attorney General, State of Florida
Respondent.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be and the same is hereby AFFIRMED.

December 20, 1982

ISSUED AS MANDATE: FEB -9 1983

[FILED JAN 24 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6107

PABLO LAZARO CHAVEZ,
Petitioner,

versus

JIM SMITH,
Attorney General, State of Florida,
Respondent.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING

(December 20, 1982)

Before TJOFLAT, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge